No. 09-1508

Supreme Court, U.S.
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In The
Supreme Court of the United States

DAVID CRITZER and MARGARET CRITZER,

Petitioners,

v.

CITY OF CUPERTINO,

Respondent,

JERRY ENOS, et al.,

Real Parties in Interest.

On Petition For A Writ Of Certiorari
To The Court Of Appeal, State Of California
Sixth Appellate District

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The petitioners, David Critzer and Margaret Critzer (collectively "Critzers"), have presented the following questions to this Court as their bases for seeking their Petition for Writ of Certiorari:

1. Must a homeowner demonstrate more than a non-trivial deprivation of property or privacy rights for the procedural due process protections of the 14th Amendment to apply?

2. Can a municipality avoid its constitutional obligation to provide homeowners with pre-deprivation notice and an opportunity to be heard by allocating *de facto* authority over such issues to a private organization?

It is critical for this Court to note that the Critzers did not question the portion of the opinion and judgment of the California Court of Appeal, Sixth Appellate District, that affirmed the trial court judgment dismissing the Critzers' administrative mandamus claim on the bases, *inter alia*, they had failed to exhaust their administrative remedies, and had failed to allege or prove that a futility exception to that exhaustion requirement was applicable (Critzers' Petition App. 11-21). Nor did the Critzers question the appellate court's decision dismissing their claim for traditional mandamus relief (Critzers' Petition App. 21-27). Thus, the dismissal was based on independent and adequate state law grounds

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which make this Court's consideration of the Critzers' questions an impermissible act of providing an advisory opinion.

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OPINIONS BELOW

The Critzers' amended petition that went to trial was for mandamus relief challenging the issuance of a building permit by the respondent, City of Cupertino ("City"), for the installation of a small bathroom window in a house owned by one of the Critzers' neighbors (Critzers' Petition App. 34). The trial court judgment found the Critzers had failed to exhaust their administrative remedies and had failed to allege or prove a futility exception to the exhaustion requirement was applicable, and thus dismissed their claim for administrative mandamus relief brought pursuant to California Code of Civil Procedure §1094.5 (Critzers' Petition App. 34-35). That same trial court judgment found that traditional mandamus relief pursuant to California Code of Civil Procedure §1085 was unavailable to the Critzers, and thus dismissed their claim for that relief as well (Critzers' Petition App. 35).

The opinion of the California Court of Appeal, Sixth Appellate District, affirmed the trial court judgment dismissing the Critzers' claim for administrative mandamus relief pursuant to California Code of Civil Procedure §1094.5 on the grounds of their failure to exhaust their administrative remedies, and their failure to establish a futility exception to that requirement (Critzers' Petition App. 11-21). That opinion also affirmed the trial court's judgment that the City's decision to issue the subject permit to install the small bathroom window required the exercise of discretion, and thus was not subject to

traditional mandamus review pursuant to California Code of Civil Procedure §1085 (Critzers' Petition App. 21-27).

The questions presented by the Critzers to this Court do not include any challenge to either of those grounds for dismissal of their lawsuit against the City.

JURISDICTION

The Critzers are not entitled to a writ of certiorari review of the dismissal of their lawsuit because they do not challenge the primary bases for that dismissal, namely, that they failed to exhaust their administrative remedies for administrative mandamus relief, and that they were not entitled to traditional mandamus relief. Both of the questions posed by the Critzers in their Petition for Writ of Certiorari pertain to alleged due process violations. However, since their claim for administrative mandamus relief was dismissed based primarily on the independent and adequate state law basis that they failed to exhaust their administrative remedies prior to commencing any judicial review of the City's decision and that traditional mandamus relief was not available, this Court lacks jurisdiction to review the questions posed by the Critzers.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions that pertain to the lack of this Court's jurisdiction to consider the questions presented by the Critzers are California Code of Civil Procedure §1094.5 (administrative mandamus review of the validity of final administrative orders), and California Code of Civil Procedure §1085 (traditional writ of mandate), which states in pertinent part,

> (a) A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person.

STATEMENT OF THE CASE

I. Factual background

The genesis of this case was a building permit issued by the City Planner for the installation of a bathroom window in a residence located in a planned unit residential development governed by the Northpoint Homeowners Association. The bathroom window was small in size, and the wall in which it was installed was approximately twenty (20) feet

from the wooden fence located between the Critzers' residence and the residence in which the window was installed.

The permit was issued pursuant to Cupertino Municipal Code §§19.44.080(A) and (B) which required the applicant to submit plans and a letter of approval from the appropriate homeowners association or architectural board, and vested in the City Planner the discretion to issue the permit if he found that the proposed changes were minor, did not affect the general appearance of the area, and did not affect the interests of owners of property within or adjoining the development area. The Northpoint Homeowners Association approved the plans for the installation of the bathroom window at a regularly noticed meeting, and the permit was issued by the City.

After the window was installed, the Critzers contacted the City and expressed concerns about the privacy impacts of the window. The City assisted the Critzers and the homeowners association in commencing a mediation of their dispute.

The mediation was not successful, and the Critzers appealed the City Planner's decision to the City Manager. Prior to any hearing on the matter, the City discovered that the Critzers had instituted a lawsuit against the neighbor who installed the window and the Northpoint Homeowners Association seeking an injunction and damages regarding the

window.[1] The hearing officer dismissed the appeal without prejudice to the Critzers to renew their appeal after their lawsuit was completed. The Critzers appealed that decision to the City Council, who referred the appeal back to the City Manager to conduct the appeal hearing. That hearing was conducted, and the hearing officer found that the City Planner had acted properly in issuing the building permit.

The Critzers then appealed that decision to the City Council who heard that appeal at a public hearing and denied the appeal. A notice of decision was mailed to the Critzers. The notice included an advisory statement that any interested person who might wish to seek judicial review of the decision must first file a petition for reconsideration with the City pursuant to Municipal Code §2.08.096. The Critzers never filed such a petition for reconsideration.

[1] In their related case *David Critzer and Margaret Critzer v. Jerry Enos, Northpoint Homeowners Association, et al.*, California Court of Appeal, Sixth Appellate District case number H033913), the Critzers entered into a judicially supervised settlement agreement with the neighbor and the homeowners association by which the Critzers received both monetary and injunctive relief regarding the same small bathroom window that is the subject of this case. The Critzers have appealed a judgment entered in that case pursuant to the trial court's supervision of the settlement agreement, and that appeal is awaiting oral argument in the appellate court.

II. Procedural history of the case.

In 2006, the Critzers filed a Petition for Writ of Administrative Mandamus, Alternative Writ, or Peremptory Writ of Mandate in Santa Clara County Superior Court. The City filed a demurrer to that Petition on the ground of failure to exhaust administrative remedies, and the court sustained the City's demurrer with leave to amend.

In 2007, the Critzers filed an Amended Petition for Writ of Mandamus, Administrative Mandamus, Alternative Writ, or Peremptory Writ of Mandate. The City filed a demurrer to the Amended Petition on the grounds that it failed to state a cause of action, and was uncertain. The court overruled the City's general demurrer because it only addressed a part of a cause of action, and overruled the demurrer based on uncertainty. However, the court did order, *sua sponte*, the prayer for the issuance of a writ of traditional mandamus under California Code of Civil Procedure §1085 stricken, without leave to amend.

The case proceeded to a non-jury trial, after which an order was filed setting forth findings that (1) the Critzers had failed to exhaust their administrative remedies, (2) the Critzers had failed to allege or prove a futility exception, (3) traditional mandamus pursuant to California Code of Civil Procedure §1085 was not available, and (4) the Critzers had failed to show any abuse of discretion, and ordered that the Petition is dismissed (Critzers' Petition App. 34-35). On February 4, 2008, a

Judgment was filed denying the Petition (Critzers' Petition App. 36-37).

The Critzers appealed the trial court judgment to the California Court of Appeals, Sixth Appellate District. That court affirmed the judgment on the bases, *inter alia*, that the Critzers failed to exhaust their administrative remedies, and that they were not entitled to traditional mandamus relief (Critzers' Petition App. 11-27). The Critzers sought a reconsideration by the appellate court, which request was denied.

The Critzers then filed a Petition for Review by the California Supreme Court claiming that review was warranted because (1) the appellate court had disregarded prior California Supreme Court rulings on the due process issues, and (2) the appellate court had disregarded futility doctrine precedents. The City filed opposition to that petition, and the requested review was denied.

REASONS FOR DENYING THE PETITION

I. The Petition for Writ of Certiorari should be denied because the State Court decision from which the Critzers' have appealed is based on independent and adequate state grounds.

"Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two

grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction." *Lynch v. New York*, 293 U.S. 52, 54-55 (1934). This self-prescribed limitation on reviewing cases decided on "independent and adequate state grounds" was further addressed in *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945), in which this Court stated,

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review would amount to nothing more than an advisory opinion.

The Critzers' lawsuit was dismissed on several grounds, including the independent and adequate state grounds that their claim for administrative mandamus was barred by their failure to exhaust their administrative remedies prior to seeking judicial review, and that their claim for traditional mandamus was not applicable to the City's quasi-judicial decision to issue the subject construction permit. It is respectfully submitted that this Court has no jurisdiction to consider this appeal.

The trial court dismissed the Critzers' lawsuit on several grounds. Their claim for administrative mandamus relief sought pursuant to California Code of Civil Procedure §1094.5 was dismissed because they

failed to exhaust their administrative remedies before seeking judicial relief. This basis for dismissal of a claim challenging an administrative decision has been upheld by the California Supreme Court (see, *Metcalf v. County of Los Angeles*, 24 Cal.2d 267, 269 (1944), in which that court dismissed an action challenging the application of a zoning ordinance to a particular parcel of property, stating, "A party aggrieved by the application of a statute or ordinance must invoke and exhaust the administrative remedies provided thereby before he may resort to the courts for relief."). As a ground for dismissal, the trial court also found that the Critzers had failed to allege or prove that a futility exception to the aforementioned exhaustion requirement was applicable (Critzers' Petition App. 34-35).

The trial court also dismissed the Critzers' claim for traditional mandamus relief sought pursuant to California Code of Civil Procedure §1085 because it was unavailable to them in challenging the City's quasi-judicial decision to issue the small bathroom window installation permit (Critzers' Petition App. 35). The California courts have determined that traditional mandamus relief "cannot be used to compel the exercise of discretion in a particular manner or to order a specific result when the underlying decision is purely discretionary." *US Ecology, Inc. v. State of California*, 92 Cal.App.4th 113, 138 (2001). The City's decision to issue the permit for the installation of the small bathroom window was such a discretionary decision.

The California Court of Appeals, Sixth Appellate District, opinion affirmed both of those grounds for the dismissal of the Critzers' lawsuit (Critzers' Petition App. 11-27). That appellate court decision also separately addressed the Critzers' procedural due process claims which they now assert as questions for this Court to review (Critzers' Petition App. 27-30).[2] Since the primary bases for dismissal of their lawsuit were the determinations that the Critzers had failed to comply with the independent and adequate state law requirement to exhaust their administrative remedies, and that traditional mandamus was not applicable to the City's decision, this Court should refrain from taking jurisdiction of this case, and the petition should be denied.

II. The appellate court decision was based on constitutionally adequate standards for procedural due process.

Aside from the fact that the appellate court decision to dismiss the Critzers' lawsuit was based on independent and adequate state law grounds as

[2] The Critzers' petition to this Court does not raise any question as to the legality of the state court's decision to dismiss the lawsuit on the state law bases of failure to exhaust administrative remedies, and that traditional mandamus is not applicable to the decision made by the City. The Critzers' omission of any such questions to this Court is a tacit admission that this Court has no jurisdiction to review those independent and adequate state law grounds for the dismissal of their lawsuit.

discussed above, the Critzers' claim for review by this Court must be denied because they received the procedural due process called for under the circumstances.

As the Critzers note in their Petition, a property deprivation that is *de minimis* does not establish a basis for a claim of due process violation. *Goss v. Lopez*, 419 U.S. 565, 576 (1975). Claims that a person was deprived of property that was either illusory or trivial in character have been dismissed on the basis that they were *de minimis*. (Critzers' Petition 9-10). Indeed, the case of *Horn v. County of Ventura*, 24 Cal.3d 605 (1979), cited in the appellate court's opinion and decried by the Critzers' in their Petition, recognizes the federal court's *de minimis* exception to procedural due process claims. In *Horn*, the California Supreme Court stated,

> We emphasize, however, that constitutional notice and hearing requirements are triggered only by governmental action which results in 'significant' or 'substantial' deprivations of property, *not by agency decisions having only a de minimis effect on land*. (Emphasis added). *Horn*, 24 Cal.3d at 616.

The Critzers' claim that the City's decision to issue the permit to install the small bathroom deprived them of a privacy right is, indeed, *de minimis*. The evidence before the City Council at the hearing on the Critzers' appeal included a statement that the small bathroom window authorized by the City's issuance of the permit created no greater an

intrusion into their privacy than the view provided from the same neighbor's existing balcony (Critzers' Petition App. 28-29, n. 6). What could be more *de minimis* than a decision to issue a permit to install a small bathroom window that does nothing to change the status quo regarding the views of the Critzers' property from the neighbor's house? Indeed, the City's decision did nothing to reduce the Critzers' privacy.

The Critzers attempt to dispute the balcony evidence by referring to other evidence received by the City Council during the hearing that the views from the small bathroom window were more intrusive than the pre-existing views from the neighbor's balcony. However, it is well-settled California law that when courts decide an administrative mandamus action, their review is limited to whether there is substantial evidence in the record to support the decision made by the administrative body. *Chaparral Greens v. City of Chula Vista*, 50 Cal.App.4th 1134, 1143 (1996). The court's review is limited to ascertaining if the administrative record shows there was " . . . any substantial evidence, contradicted or uncontradicted, to support . . . (the findings of the decision-making body)." *Jones v. City Council*, 17 Cal.App.3d 724, 728 (1971). In its review, the court must resolve reasonable doubts in favor of the administrative finding and decision. *Marin Muni. Water Dist. v. KG Land California Corp.*, 235

Cal.App.3d 1652, 1660 (1991).[3] In this case, the appellate court followed that law by accepting the evidence received by the City that the small bathroom window afforded the neighbor the same view as already existed from his balcony (Critzers' Petition App. 28-29). Since the new window did not alter the status quo of the neighbor's views of the Critzers' property, the change was *de minimis* and there was no due process violation.

CONCLUSION

The appellate court affirmed the dismissal of the Critzers' lawsuit on the grounds that they failed to exhaust their administrative remedies prior to seeking administrative mandamus relief pursuant to California Code of Civil Procedure §1094.5, and because their claim for traditional mandamus relief pursuant to California Code of Civil Procedure §1085 was not applicable for the review of the City's exercise of discretion in making its decision to grant the small bathroom installation permit. The appellate court

[3] It must also be noted that this Court defers to state court findings of fact made in connection with federal constitutional claims (see, *Hernandez v. New York*, 500 U.S. 352, 356 (1991)), even when the facts resolved by the state court are dispositive of the ultimate constitutional question (see, *Miller v. Fenton*, 474 U.S. 104, 113 (1985)). Thus, the appellate court's confirmation of the City's factual determination that the view from the newly installed small bathroom window was the same as from the pre-existing balcony is not subject to review.

further determined that the Critzers' due process rights were not violated because the City accepted evidence that the neighbor's small bathroom window provided the same view of the Critzers' property as was provided from the existing balcony on that neighbor's property, thus complying with the *de minimis* property right exception to the due process requirements.

For all of the aforementioned reasons, the Critzers' questions presented to this Court as the bases for writ of certiorari review regarding due process issues are both beyond the review of this Court because the case was dismissed on independent and adequate state grounds, and because the law applied by the appellate court to the due process questions complied with the applicable *de minimis* exception standard. Accordingly, it is respectfully requested that the Critzers' petition be denied.

Respectfully submitted,

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